SUPREME COURT OF THE UNITED STATES.

W. W. BAUGHN, NEXT FRIEND OF ELIZABETH HOUSE,

Plaintiff in Error,

vs.

STATE OF GEORGIA, Defendant in Error.

In Error to the Supreme Court of Georgia.

Brief and Argument of Counsel for Defendant in Error.

ATLANTA, GA.:
THE FRANKLIN PRINTING AND PUBLISHING CO.
Geo. W. Harrison, State Printer, Manager.
1897.

Supreme Court of the United States.

W. W. BAUGHN,
Next friend of Elizabeth Nobles, Plaintiff in Error,

vs.

STATE OF GEORGIA,
Defendant in Error.

No. ..... October Term, 1897.

In Error to the Supreme Court of Georgia.

Brief and Arguement of Counsel for Defendant in Error.

STATEMENT OF FACTS.

At a special term of the Superior Court of Twiggs county, Georgia, in July, 1895, Elizabeth Nobles was convicted of murder and sentenced to death. A motion for a new trial upon several grounds, including that of insanity at the time of the commission of the offense, was made, pending which the sentence of death was suspended. A new trial was refused by the Court, and the case was then taken by writ of error to the Supreme Court of Georgia, where the judgment of the Court below was affirmed on the 13th day of January, 1896. See 98 Ga. 73.

On the 23d day of January, 1896, W. W. Baughn, as next friend of Elizabeth Nobles filed in the Circuit Court of the United States for the Southern District of Georgia an application for writ of *habeas corpus* against the officers of the law having custody of said Elizabeth Nobles, alleging therein that said Nobles was insane, and

that she was about "to be sentenced to death and about to be executed and deprived of life without due process of law and in violation of the 14th amendment to the Constitution of the United States." On the 4th day of February, 1896, the Circuit Court dismissed the application and discharged the writ which issued thereon. From this judgment an appeal was taken to this Honorable Court, and on the 4th day of May, 1896, the said case, which was No. 927, October term, 1895, was dismissed pursuant to the 10th Rule. See 163 U. S. 677.

On the 23d day of June, 1896, the said Elizabeth Nobles was carried before the Superior Court of Twiggs county, Georgia, for the purpose of being resentenced, as provided by the laws of the State, and when the said case was called for that purpose, W. W. Baughn, as next friend of Elizabeth Nobles, presented his petition to the Court objecting to the imposing of the sentence, for the reason that the said Elizabeth Nobles was then insane, and praying the Court to summon and impanel a jury to determine the question as to her insanity. The petition also alleged that unless such question was submitted by the Judge of the Superior Court to a jury in that Court, that "due process of law" under the 14th Amendment to the Constitution of the United States would be denied to her. The Court overruled this petition and denied same, to which ruling the petitioner excepted, and notwithstanding said objections, sentenced Elizabeth Nobles to be executed on August 7th, 1896. After said sentence was imposed and at the same term of the Court, said Baughn, as the next friend of Elizabeth Nobles, presented to the Court another petition containing the same allegations and praying that the sentence of death should not be executed. This petition or motion was likewise overruled, and to this ruling or judgment petitioner also excepted. A bill of exceptions to said rulings was then

presented to the Judge of said Court, which was properly certified, and the case was then taken to the Supreme Court of Georgia, where on the 12th day of May, 1897, the case was disposed of by affirming the judgment of the Court below. The head-notes of the decision being as follows :

"1. There is no law of force in this State which makes it incumbent upon a judge of the superior court at the time when judgment is to be entered, or after it has been entered, to allow or order a judicial investigation concerning the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case and who has thereby become subject to the penalty of death; nor in either instance is a refusal by such judge to enter upon an investigation of this kind, with or without the aid of a jury, a denial to the prisioner of 'due process of law.'"

"2. The provisions of the Code relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty.

"Judgment affirmed.

"All the justices concurring."

The opinion of Mr. Justice Cobb in the case not having yet been published, it is hereto attached as an appendix.

Section 1047 of volume 3 of the Code of Georgia is as follows :

"If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence and assistance of the ordinary thereof, shall summon a jury of twelve men to inquire into such insanity. The following oath shall be administered to the jury, to wit : 'You and each of you do solemnly swear (or affirm) that you will well and truly

try this issue of insanity between the State and A. B., now condemned to die, and a true verdict give according to the evidence. So help you God.' If it be found by the inquisition of such jury that the convict is insane, the sheriff shall suspend the execution of the sentence, and make report of the inquisition and suspension of execution to the presiding judge of the circuit, who shall cause the same to be entered on the minutes of the superior court of the county where the conviction was had.'

BRIEF OF ARGUMENT.

The position of Elizabeth Nobles is the same as if she, after conviction and sentence, made application to the superior court to have her mental contition submitted to a jury therein.

Neither the Constitution of the United States nor of the State of Georgia guarantees to a person convicted of crime, who may thereafter become insane, the right to have judicially determined the question of sanity. Neither does the common law guarantee such a trial as a matter of right. At common law the stay of execution depends on the discretion of the judge. 1 Hale, 370; 4 Blackstone's Com. 395; 1 Hawk. P. C. 3; Bonds v. State, Mart. & Yerg. 492 (bottom number); 13 Ala. 153; 84 Pa. 200; Carr's Trial of Lunatics, 87. As was said by McCoy, ~~Judge~~ Justice, in 47 Ga. 551, "The whole proceeding at common law is merely a stay of execution, and is based rather upon the public will and a sense of propriety than any right in the prisoner." The question as to whether a person who is convicted of murder, and sentenced to death, and afterwards becomes insane, shall be punished as prescribed in the sentence is purely a police question, and when a State by its laws provides for an inquisition to inquire into the sanity of such person, all requirements, both as to the rights of the prisoner, and as to public propriety and decency are fully met.

The due process of law which the constitution requires was given to Elizabeth Nobles by the State of Georgia and the courts thereof in the trial had in Twiggs Superior Court upon the charge of murder, where a verdict of guilty was rendered, which verdict was upheld by the supreme court of the State. By that verdict it is declared that she has forfeited her life, and if since its rendition and her sentence thereunder, she has become insane, it is

purely a police question as to what shall be done in the matter of staying her execution. In the case of Carr *v.* the State, 98 Ga., 89, it was held that proceedings under section 1047 of the Code, "are in the nature of an inquisition and are not judicial in character, and there is no provision of law for reviewing the same." For this reason appellant says that the means afforded by the laws of Georgia to determine this question do not constitute due process of law. The right of review or the right of appeal to a higher court is not a matter of absolute right. 153 U. S. 684; 148 U. S. 657. In 149 U. S. 645, and 110 U. S. 516, it is held that due process of law does not require an indictment by a grand jury if the constitution of the State authorizes prosecution by information. The case of Dent *v.* West Virginia, 114 U. S., very clearly defines what legislation is open to objection as depriving one of his rights without due process of law; also 139 U. S. 499, and the same, 446, will be found very much in point.

In the case of Duncan, 152 U. S. 377, it was held that due process of law was secured if the laws operate on all alike, and are not the arbitrary exercise of the powers of the government. Mr. Chief Justice Fuller, speaking for the court, says on page 382: "But the priveleges and immunities of citizens of the United States, protected by the 14th amendment, are priveleges and immunities arising out of the nature and essential character of the Federal Government, and granted or secured by the constitution; and due process of law and the equal protection of laws are secured if the law operates on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Section 1047 of the Code of Georgia is by no means the arbitrary exercise of the powers of government. It makes ample provision for an inquisition to inquire into

the sanity of a person convicted of crime. At common law an inquisition rested solely within the discretion of the judges. The provisions of the Georgia statute are such that certain officers may be compelled to grant the inquisition, hence it is far more humane and liberal than the common law. The Georgia plan is also far more humane than that of many of the States. As to the manner of dealing with insane convicts under sentence of death, see Carr's Trial of Lunatics. As to Iowa, see page 74, Kansas, page 76, Massachusetts, page 78, Minnesota, page 78, New York, page 80.

J. M. TERRELL,
Of Counsel for Defendant in Error.

Atlanta, Ga.

APPENDIX.

After stating the facts and citing the sections of the Georgia Code and several decisions of the Georgia Supreme Court, Mr. Justice Cobb concludes the opinion of the Court as follows :

"We therefore treat this as the application of a person convicted and sentenced to have the question of her mental condition tried by a jury in the Superior Court according to the forms of procedure incident to investigations in that Court. Has a convict the right, after verdict and sentence, and his life according to "due process of law," thus forfeited to the State, to demand as "due process of law " that his mental condition shall be inquired into, in order to determine whether the judgment of the Court shall go into execution ? "Inasmuch as the stage of criminal procedure known as pleading has been passed at the time when, after conviction, the issue as to insanity in bar of sentence is asked for, the point as to constitutional right may not be involved. Carr's Trial of Lunatics, page 87. In the case of Laros v. Commonwealth, 84 Pa. St., pp. 200, 210, the Court says : "The last three assignments of error raise a single question upon the power of the Court to inquire by inspection and per testes into the insanity of the prisoner since verdict. We have no precedents in this State, known to us, how the inquiry shall be conducted when such a plea in bar of sentence is put in. It seems to us, however, that no right of trial by jury is involved in the question. A jury having found a verdict against the plea of insanity when set up as a defense to conviction, subsequent insanity cannot be set up in disproof of conviction. The plea at this stage is only an appeal to the humanity of the Court to postpone the punishment until a recovery takes place, or as a merciful dispensation."

"The rights of the prisoner as an offender on trial for an offense are not involved. He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity. If the right of trial by jury exists at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with a due administration of justice. There must be a sound discretion to be exercised by the Court. If a case of real doubt arise, a just Judge will not fail to relieve his own conscience by submitting the fact to a jury."

It is in the power of any person interested in the prisoner to call for an investigation under the Penal Code, section 1047, or the judge himself may order the investigation. The purpose of the legislature evidently was to carry out the principal referred to in the decision above quoted, and provide a method for the trial of a question which simply involved a plea to the humanity of the court to postpone the punishment of an insane person until a recovery takes place.

In the case of Jones *v.* the State, 13 Alabama, 153, the court, in dealing with the question of insanity at the time of trial, says : "Although we are of opinion that the facts disclosed in the bill of exceptions might well have warranted the preliminary enquiry as to the prisoner's mental condition, yet this must be left to the sound discretion of the court. If, amid the mystery and veil which surrounds the phenomena of mental aberration, so difficult to penetrate, the judge should be mistaken and try an insane man (as we think has been done in the case before us) it will present a case in which there may be a strong appeal to executive clemency."

In the case of Spann *v.* the State, 47 Ga. 551, in referring to the law now contained in Penal Code, section 1047, Judge McCay says : "The stay for insanity

seems to depend on the discretion of the judge at common law." 1 Hale, 370. "He may call in a jury if he pleases. The whole proceeding is merely a sta yof execution, and is based rather upon the public will and a sense of propriety, than on any right in the prisoner. * * * The whole proceeding is rather an inquiry based on public propriety and decency than a mattar of right." While the question as to whether the section under consideration was due process of law is not involved directly in the case of Carr *v.* the State, 98 Ga., still in passing upon the right of the superior court to review a proceeding under that section by certiorari, the majority of the court recognized the proceeding as being "rather an inquiry based on public propriety and decency, than upon any right of the defendant." The effect of that decision was to hold that no judicial investigation was required to be given to a person as a matter of right, and that all investigations after conviction were simply to inform the court imposing the sentence as to the mental condition of the prisoner for the sole purpose of determining whether it would be consistent with public decency and propriety to take away the life of a person who had not mind enough to realize what was being done.

There being no law of force in this State which authorizes or requires the judge of the superior court to enter into an investigation of the mental condition of Elizabeth Nobles at the time and in the manner prayed for in the petition filed in her behalf, the refusal by the judge to enter into such investigation was not a denial to her of "due process of law"; and there was, therefore, no error in declining to entertain such petition, and in denying "each and every prayer" therein. Judgment affirmed.